

2003 WL 25746174 (Miss.Cir.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Mississippi.  
Grenada County

The Estate of Vader I. PERRY by and Through Betty Rayburn, Administratrix of the Estate of Vader I. Perry, for the Use and Benefit of the Estate of Vader I. Perry, and for the Use and Benefit of the Wrongful Death Beneficiaries of Vader I. Perry, Plaintiff,

v.

MARINER HEALTH CARE, INC.; F/K/A Mariner Post-Acute Network, Inc.; Grancare, Inc.; Evergreen Healthcare, Inc.; National Heritage Realty, Inc.; John Does 1-10; and Unidentified Entities 1-10 (as to Grenada Health & Rehabilitation Center), Defendants.

No. 2001-0485CVL.  
December 4, 2003.

**Motion in Limine Regarding Punitive Damages**

[L. Carl Hagwood](#), MBN 2039, [Senith C. Tipton](#), MBN 8227, [Jason E. Dare](#), MBN 100973, Attorneys for Defendants National Heritage Realty, Inc., Evergreen Health Care, Inc., GranCare, Inc., and Mariner Health Care, Inc.

NOW COME National Heritage Realty, Inc. ("National Heritage"), Evergreen Health Care, Inc. ("Evergreen"), GranCare, Inc. ("GranCare"), and Mariner Health Care, Inc. ("Mariner"), herein collectively referred to as "Defendants," by and through counsel, and move this Court to prohibit Plaintiff, Plaintiffs counsel, and any witnesses called by Plaintiff or Defendants from disclosing information which is properly excluded regarding the issue of punitive damages, by stating as follows:

**1.**

The Mississippi Supreme Court has, on numerous occasions, identified the instances in which punitive damages may be awarded. In order for punitive damages to be awarded, the injuries must have "some element of aggression or some coloring of insult, malice, or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule." [Ross-King-Walker, Inc. v. Henson](#), 672 So.2d 1188, 1192 (Miss. 1996). In [Weems v. American Security Insurance Company](#), 486 So.2d 1222 (Miss. 1986), the Court examined the case law regarding punitive damages and identified:

... two somewhat distinct types of circumstances wherein one's conduct may subject him to punitive damages: where the defendant acted with malice and where the defendant acted with gross negligence or reckless disregard for the rights of others.

[Weems](#), 486 So.2d at 1226.

**2.**

The *Weems* approach has been followed in numerous subsequent cases, including but not limited to [South Central Bell v. Epps](#), 509 So.2d 886, 892-93 (Miss. 1987); [Scott v. Transport Indemnity Co.](#), 513 So.2d 889, 896-97 (Miss. 1987); [Blue Cross and Blue Shield of Mississippi, Inc. v. Maas](#), 516 So.2d 495, 496-97 (Miss. 1987).

3.

In order for the Plaintiff in this case to be entitled to recover punitive damages, it must be shown that the Defendants “demonstrated a willful or malicious wrong or the gross, reckless disregard for the rights of others.” *Finkelberg v. Luckett*, 608 So.2d 1214, 1220 (Miss. 1992).

4.

Additionally, Miss. Code Ann. § 11-1-65 (1)(a) provides as follows:

Punitive damages may not be awarded if the *claimant does not prove by clear and convincing evidence* that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.

5.

When determining whether to allow punitive damages, the court's decision is whether there is sufficient evidentiary basis for such damages. *Colonial Mortgage Co., Inc. v. Lee*, 525 So.2d 804, 808 (Miss. 1988). “The trial court... must look at the elements of the punitive damages claim enumerated above and decide whether, under the totality of the circumstances and viewing the defendant's conduct in the aggregate, a reasonable, hypothetical trier of fact could have found either malice or gross neglect/reckless disregard.” *Id.* (citing *Life Insurance Company of Mississippi v. Allen*, 518 So.2d 1189, 1193 (Miss. 1988); *Mississippi Farm Bureau Insurance Company v. Todd*, 492 So.2d 919, 933 (Miss. 1986).

6.

In the case of *State Farm Mutual Insurance Company v. Campbell*, 123 S. Ct. 1513 (2003), the United States Supreme Court issued a caution to lower courts regarding punitive damages. The Supreme Court stated that evidence regarding conduct of the Defendants “*must have a nexus to the specific harm suffered by the plaintiff.*” *Id.* (emphasis added). In *Campbell*, a claim for bad faith, fraud, and intentional infliction of emotional distress was asserted against State Farm for failure to settle a claim within policy limits and to pay the judgment following a trial. During the trial, State Farm filed a motion to exclude evidence of dissimilar out-of-state conduct, which the Court denied. In the second phase, which addressed, *inter alia*, compensatory and punitive damages, evidence was introduced that pertained to State Farm's business practices in numerous states, but bore no relation to the type of claims underlying the Campbell's complaint. The jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million and \$25 million, respectively.

7.

On appeal, the United States Supreme Court held that while compensatory damages are intended to redress a plaintiff's concrete loss, punitive damages are aimed at the different purposes of deterrence and retribution. The Court further stated that punitive damages awards serve the same purpose as criminal penalties; however, because civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute danger of arbitrary deprivation of property, which is heightened when the decision maker is presented with evidence having little bearing on the amount that should be awarded.

8.

In its decision, the Supreme Court noted:

A defendants' dissimilar acts, independent from the acts upon which liability was premised, any not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. 65 P.3d at 1149 (“Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: The harm is minor to the individual by massive in the aggregate.”) Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case non-parties are not bound by the judgment some other plaintiff obtains. *Gore, supra*, at 593, 116 S. Ct. 1589 (BRYER, J., concurring) (“Larger damages might also ‘double count’ by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover”).

*Campbell*, 123 S. Ct. at 1523.

9.

The Court also criticized the Utah Supreme Court's introduction of State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrupted its employees. Although noting that the Campbells attempted to justify the courts' reliance upon this unrelated testimony on the theory that each dollar of profit made by underpaying a third-party claimant is the same as a dollar made by underpaying a first-party one, the Supreme Court characterized this evidence as “even more tangential” than evidence of unrelated conduct. Noting that under the Court's decision of *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), the reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period, where the Plaintiff fails to demonstrate any conduct by the Defendant similar to that which harmed them, stating that “the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.” *Campbell*, 123 S. Ct. at 1523.

10.

Defendants anticipate that the Plaintiff will attempt to introduce at the trial of this matter certain information that is explicitly excluded, especially during the compensatory phase, and additionally not allowed under the punitive phase. Such evidence of information includes, but is not limited to, the following:

1. Evidence of other incidents not “similar” to the Plaintiffs alleged breaches and damages;
2. Evidence that Greenwood Health and Rehabilitation Center and/or any other Defendant in this matter is associated with other nursing homes, although this relationship does not pertain to Greenwood Health and Rehabilitation Center and/or Charles Edwards.
3. Evidence regarding incidents that did not cause harm to Charles Edwards;
4. Evidence contained in survey citations, for which the Defendants have already been “punished;”
5. Evidence contained in surveys that do not relate to any injuries or damages allegedly sustained by Charles Edwards; and/or
6. Testimony of employees and former employees regarding alleged breaches in standard of care not related to the breaches alleged by the Plaintiffs in this case.

**11.**

Accordingly, the Defendants request this Court to order *in limine* that any such evidence identified above or excluded by the Mississippi Supreme Court and the United States Supreme Court which is anticipated to be sought to be introduced by the Plaintiff at the trial of this matter is inadmissible.

WHEREFORE, PREMISES CONSIDERED, Defendants National Heritage, Evergreen, GranCare and Mariner pray that this Court grant their aforementioned Motion *in Limine* in regards to the evidence admissible in a punitive damages case, if any.

RESPECTFULLY SUBMITTED, this 3<sup>rd</sup> day of December, 2003.

L. CARL HAGWOOD, MBN 2039

SENITH C. TIPTON, MBN 8227

JASON E. DARE, MBN 100973

BY:<<signature>>

Attorneys for Defendants National Heritage

Realty, Inc., Evergreen Health Care, Inc.,

GranCare, Inc., and Mariner Health Care, Inc.

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